(21)

Supreme Court, U.S.
FILED
NOV 18 2002
CLERK

No. 01-1325

IN THE
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

Charles Fried
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636

Donald B. Ayer
Louis K. Fisher
Jones, Day, Reavis & Pogue
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

James J. Purcell
1218 3rd Ave., #2403
Seattle, WA 98101
(206) 622-5322

Date: November 18, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONDENTS' ALLEGED REGULATORY PURPOSE IS AN AFTER-THE-FACT CONTRIVANCE THAT CANNOT JUSTIFY THEIR TAKING PETITIONERS' PROPERTY 3

II. BY TAKING ALL IOLTA INTEREST, LFofW TAKES PROPERTY OF A DEFINITE AND EASILY ASCERTAINABLE VALUE: THE DOLLAR VALUE OF THE INTEREST TAKEN 9

A. That a Client Cannot Show a Decrease in His Net Worth as a Result of LFofW Taking His Property Is Irrelevant to His Claim 10

B. The Value of the Interest Taken Is Just the Dollar Amount of That Interest 13

III. EQUITABLE RELIEF IS APPROPRIATE, AND THE COURT SHOULD DECLARE THE IOLTA PROGRAM UNCONSTITUTIONAL AS PRESENTLY CONSTITUTED 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Andrus v. Allard,
444 U.S. 51 (1979) 6
City of New York v. Sage,
239 U.S. 57 (1915) 15
Dolan v. City of Tigard,
512 U.S. 374 (1994) 9
Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 3, 18, 19
Hodel v. Irving,
481 U.S. 704 (1987) 14
Kimball Laundry Co. v. United States,
338 U.S. 1 (1948) 14
Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 8
Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978) 1, 8, 9, 14
Phillips v. Washington Legal Found.,
524 U.S. 156 (1998) . . . . . *passim*
Preseault v. Interstate Commerce Comm'n,
494 U.S. 1 (1990) 16
Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 16
Webb's Fabulous Pharmacies v. Beckwith,
449 U.S. 155 (1980) 15, 18
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 16, 17

Page

Constitutional Provisions:

U.S. Const., Amend. V, Takings Clause . . . . . *passim*

Rules:

Washington Admission to Practice Rules ("APRs")
APR 12(h) 4
APR 12.1 4
APR 12.1(c) 8
APR 12.1(c)(3) 7
APR 12.1(c)(4)(i) 10

Washington Rules of Prof. Conduct ("RPC")
RPC 1.14(c) 8
RPC 1.14(c)(3) 7
RPC 1.14(c)(4)(i) 10

Miscellaneous:

Kristi L. Darnell, "Pennies from Heaven -- Why *Washington Legal Foundation v. Legal Foundation of Washington* Violates the U.S. Constitution," 77 WASH. L. REV. 775 (2002) 10

REPLY BRIEF FOR PETITIONERS

In *Phillips,* this Court established that the interest paid on clients' IOLTA accounts is the property of clients. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Throughout this litigation, Respondents and their *amici* have emphasized the good work accomplished by IOLTA funds -- which in 2001 totaled at least $162,000,000 nationwide. AARP Br. 11 n.14. How did the IOLTA programs get all this money? In plain English, they took it.

In our opening brief, we urged that a *per se* taking should be found in those situations where the character of the governmental action is such that the consideration of the remaining factors in this Court's *Penn Central* test could not possibly alter the conclusion that a constitutional taking has occurred. We showed further that the Washington IOLTA program, which is a simple appropriation of property from a small number of people to fund a government program of general application, should be found to be a *per se* taking.

Respondents and their *amici* argue that the appropriation of interest is, in fact, justified by a regulatory purpose directed at temptations associated with the handling of client money by lawyers and real estate professionals. Justices Br. 8-14, 27-31, 37-38; LFofW Br. 21-23. In essence, they argue that the IOLTA program is really a prophylactic measure to deliver the service providers from temptation, and save clients from unethical behavior of those they hire; so in order to keep providers of legal services from capturing some benefit -- direct or indirect -- from their possession of client funds, IOLTA will protect the clients by taking for itself all of this property of the clients.

For reasons set forth below, this alleged regulatory purpose is a *post hoc* rationalization which this Court should reject as irrelevant. Until their briefs to this Court, Respondents had hardly adverted to this implausible regulatory purpose. Even assuming this regulatory purpose had

indeed been a motivating concern of the IOLTA program, it could not justify the actual appropriation of property. The Bar has many ways of regulating the conduct of those under its authority, including dictating where money may be deposited or simply commanding the avoidance of conflicts of interest of the sort allegedly relevant here. The notion that in order to protect clients it may also seize their property outright, goes far beyond any regulatory justification this Court has found relevant in a takings context.

We argued in our opening brief that the same result should obtain -- and a taking should be found -- even if the IOLTA program is analyzed under the *Penn Central* factors rather than as a *per se* taking. In particular, given the Court's holding in *Phillips* that the interest appropriated under IOLTA is the property of the client, the economic impact and effect on investment-backed expectations are clear. The government has taken, and the client has been denied, an amount of money that is identifiable, albeit small. Surely, this violates the only reasonable expectation that the client could have: if interest is earned, it belongs to him and will not be seized, willy-nilly, by the government.

Respondents and their *amici* nonetheless belabor the same issues argued before this Court in 1998, renewing in new words their rejected argument that a different conclusion should be reached where it is shown that, absent IOLTA, the client would not have received any interest, so that the IOLTA interest is somehow government-created value. Justices Br. 33-36, 40-43; LFofW Br. 17-20, 33-37. But, as the Court stated in *Phillips*, even if it were true that no interest could be earned in the absence of IOLTA, the interest is still the product of the principal of the client, and is thus the property of the client to which the government has no *a priori* claim. To say that the interest is both the client's property and subject to seizure because of the manner by

which it was generated, would be to empty that legal status of all meaning.

Finally, it is entirely clear that any practical form of relief from such a programmatic taking requires equitable action by the Court. The Ninth Circuit's categorical rejection of equitable relief in Takings Clause cases of this sort finds no support in this Court's decisions. *Eastern Enterprises* and earlier cases well recognize the appropriateness of equitable relief from a government program where the purpose of the program is the transfer of money, and the retransfer remedy amounts to an undoing of the program itself. Moreover, the amounts in issue are both identifiable and so small as to make individualized actions for recovery impractical. Thus, a declaration of the unconstitutionality of the IOLTA program as currently constituted is entirely appropriate. It is the only judicial remedy capable of addressing the constitutional wrong.

I. RESPONDENTS' ALLEGED REGULATORY PURPOSE IS AN AFTER-THE-FACT CONTRIVANCE THAT CANNOT JUSTIFY THEIR TAKING PETITIONERS' PROPERTY

Respondents discover a regulatory justification for the IOLTA program: to prevent "self-dealing" by Limited Practice Officers (LPOs) who, prior to the adoption of the IOLTA program, allegedly received financial benefits in return for depositing client funds in favored financial institutions. Justices Br. 8-14, 27-31, 37-38; LFofW Br. 21-23. That argument is contrary to the record, was never asserted by the Justices in adopting the IOLTA program, and could not, in any event, justify the uncompensated taking of Petitioners' funds.

The Washington Supreme Court adopted the IOLTA program in 1984. Its order adopting the program (JA 146-166) explains at length its reasons for doing so; at no point does the order state that the court adopted the IOLTA rules as a means to prevent self-dealing by attorneys in their handling of client funds. Rather, the sole stated purpose was to benefit legal services programs by earning interest on client funds that previously had not generated interest. Indeed, the court explained that clients were not harmed by creation of the IOLTA program *precisely because* clients had no property rights in any interest generated by their funds. JA 152-58. The Supreme Court's September 21, 1995 order adopting APR 12(h) and 12.1 (thereby expanding the IOLTA program to cover LPOs and their employers) was similar and expressed no purpose to protect depositors from self-dealing by escrow and title companies.

Moreover, the IOLTA program could not possibly be deemed a regulation of the escrow industry because, as Respondents admit, the Washington Supreme Court does not regulate that industry and never has. Justices Br. 38 n.6; LFofW Br. 22 n.14. Such regulation has at all times resided within the State's executive branch. *Id.*[1] Prior to 1995,

[1] The Washington Supreme Court claims authority to regulate the practice of law, and it determined in 1981 that the completion of form real estate documents constituted the practice of law. Justices Br. 8. As a result of that determination, the court created a new class of individuals known as "limited practice officers" (LPOs) who were licensed to complete form real estate documents without the assistance of lawyers -- thereby permitting escrow and title companies to continue their longstanding practice of having non-lawyers prepare such documents. In asserting the right to regulate the practice of law, the court has asserted regulatory authority over document preparation by LPOs but not over their employers' other activities. LPOs employed by escrow and title companies often have no involvement with their

(continued...)

regulatory authority over the escrow industry resided with the Washington State Department of Licensing (DOL); in that year, it was transferred to the Washington Department of Financial Institutions (DFI), with DOL regulations being renumbered and readopted by DFI. LFofW Br. 22. Respondents know full well that DOL and DFI have been completely aware of and have never raised any objection to the "earnings credits" system that Respondents now decry and offer as the occasion for the confiscation of Petitioners' property. Indeed, despite Respondents' assertion that the IOLTA program is designed to prevent "self-dealing" by eliminating the earnings credits system, that system remains in place -- with the full knowledge of State regulators.[2]

[1](...continued)
employers' escrow practices.

[2] Although the expansion of IOLTA to cover escrow and title companies has led many banks to eliminate earnings credits, others continue to offer them (albeit at a reduced level) while at the same time paying interest on deposited funds and forwarding the interest to the Legal Foundation of Washington. Pet. App. 111a-112a. At least one title company has avoided being subject to the IOLTA program by getting rid of all its LPOs and requiring clients to hire their own attorneys to perform the document-drafting work formerly performed by its LPOs. JA 59. Thus, that company's ability to generate earnings credits has been unimpaired. At the same time, of course, its clients are faced with higher closing costs (the costs of hiring an attorney) -- a direct result of the 1995 expansion of the IOLTA program.

Contrary to LFofW's claim, earnings credits are *never* granted to affiliates of escrow companies; rather, they are granted solely to the escrow companies themselves and can be used *solely* to offset "fees that would otherwise be payable to the bank for a variety of services rendered by the bank" in connection with the escrow account. Pet. App. 111a. Those services -- including wire transfers and escrow trust

(continued...)

Petitioners bring up these matters not to defend the earnings credits system nor to leave the impression that earnings credits are somehow crucial to their claim, but to show how contrived this supposed regulatory purpose is. This Court should resist Respondents' efforts to craft a *post hoc* justification for their confiscation of Petitioners' funds.

In any event, Respondents' regulatory justification is insufficient to defeat Petitioners' Takings Clause claims. Respondents contend that the IOLTA program is intended to protect escrow depositors from "LPO self-dealing." Justices Br. 27. But this "protection" is carried out by confiscating funds from IOLTA depositors that, *Phillips* held, belong to the depositors. Citing *Andrus v. Allard*, 444 U.S. 51, 58-59 (1979), Respondents assert, "Removing incentives for harmful conduct or the evasion of regulatory prohibitions is well within the government's police powers." Justices Br. 29. That assertion misses the mark; such motivations may, in appropriate circumstances, justify *regulation* of private property, but they can never justify uncompensated *confiscation* of private property, particularly where (as here) the government seeks to justify its actions as a means of protecting the very person whose property is being confiscated.

---

[2](...continued)
accounting services -- "are of significant value to those whose funds have been deposited in escrow accounts," *id.*, and are provided by banks without charge only because of the availability of earnings credits. Although federal law has long prohibited banks from paying interest on checking accounts, the Federal Reserve Board has ruled that the granting of earnings credits to escrow companies does not constitute the payment of interest. JA 76-80.

Even if -- contrary to the record and Respondents' admissions -- the Washington Supreme Court could establish that it possessed authority under Washington law to prohibit banks from granting earnings credits to escrow companies, its IOLTA program still could not pass muster under the Takings Clause. Respondents cite only one "benefit" bestowed on depositors by the IOLTA rules: they require lawyers and LPOs "to place the funds in an interest-bearing account for the benefit of the client where they could generate net interest for the client." Justices Br. 5. But as the Washington Supreme Court admitted when it established the IOLTA rules, professionals were already in most instances generating interest for their clients in those circumstances. JA 149-150. Moreover, the regulatory goal Respondents now assert -- of ensuring that escrow depositors are earning interest on their funds whenever possible -- does not begin to explain how Respondents are justified in taking the interest for themselves when the depositors could not earn (what Respondents call) "net interest."[3] If the Supreme Court's regulatory goal had been to prevent alleged "self-dealing" by escrow companies in those instances in which "a positive net return" cannot be generated for depositors (perhaps by depositing client funds not in the most financially stable banks but in those conferring the greatest benefits to the escrow companies),

---

[3] The IOLTA rules require that, in determining whether client funds can generate a "positive net return for the client," an attorney or LPO should subtract from projected gross interest not only the fees charged by the bank but also all overhead costs incurred by the attorney or LPO in establishing and administering a separate interest-bearing account. RPC 1.14(c)(3) and APR 12.1(c)(3), set forth at Pet. App. 101a, 107a. Thus, the IOLTA rules preclude an attorney/LPO from arriving at an agreement with his/her client regarding what, if any, overhead expenses are to be charged against the gross interest that could be earned by the client.

then it could have adopted a rule prohibiting such actions without also confiscating Petitioners' property. For instance, a rule requiring that client funds only be deposited in appropriately insured institutions would serve that purpose.[4]

In the course of arguing that the IOLTA program should be upheld under the *Penn Central* balancing test, Respondents cite the preceding regulatory purposes as "legitimate and important regulatory purposes" that should weigh on the "no taking" side of the scale. Justices Br. 37; LFofW Br. 23. Even assuming that the *Penn Central* test has some application to this case, Respondents' efforts to invoke their alleged regulatory purposes in this manner are unavailing. They seem to suggest that their regulatory regime should be judged under something akin to a rational basis test. *See, e.g.*, LFofW Br. 23 (challenged rules "reasonably advance important public purposes"). But this Court has made clear that such deferential review of government economic regulation is confined to equal protection and due process cases and has no place in Takings Clause analysis. *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 n.3 (1987). Rather, even when a property owner seeks an award of some discretionary benefit, the government may not demand that the owner cede some of his property in return for grant of the benefit unless there is an "essential nexus," *id.* at 837, and "rough proportionality" between the government's legitimate regulatory interests and exaction of the property it demands.

---

[4] The IOLTA program does, in fact, require funds held by attorneys or escrow companies to be deposited only in institutions insured by either the federal government or the Washington Credit Union Share Insurance Fund. RPC 1.14(c), APR 12.1(c); Pet. App. 100a, 105a. Indeed, the requirement that client funds be deposited in insured institutions long pre-dates the adoption of IOLTA.

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).[5] There can be no "rough proportionality" where, as here, property owners are not asking for *any* discretionary benefit yet are nonetheless faced with confiscation of their property for the supposed purpose of protecting them from others.

All this is perhaps an overly elaborate refutation of an argument the mere statement of which refutes it: that the IOLTA program protects the clients' property by taking it.

II. BY TAKING ALL IOLTA INTEREST, LFofW TAKES PROPERTY OF A DEFINITE AND EASILY ASCERTAINABLE VALUE: THE DOLLAR VALUE OF THE INTEREST TAKEN

Respondents rehearse a number of familiar takings doctrines to defeat the clients' claims. They remind the Court that in determining just compensation, it is the loss suffered by the deprived owner that counts, not the gain to the government. Justices Br. 41; LFofW Br. 36. In this connection they refer throughout to the amount clients lose as their "net benefit" or "net interest" on IOLTA deposits. *Id.* They rely on the *Penn Central ad hoc* balancing test to argue that the clients have no investment-backed expectation in the moneys that IOLTA confiscates. And from this they draw the conclusion that there is no Fifth Amendment violation and no just compensation is due because, they claim, Petitioners have lost nothing. All this persiflage cannot obscure the simple fact that the precise value of one dollar is one dollar,

---

[5] In rejecting the dissent's contention that the government's property demands were "a species of business regulation that heretofore warranted a strong presumption of validity," *Dolan* went on to explain, "Simply denominating a government measure as a 'business regulation' does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights." *Id.*

and that Petitioners suffer one dollar of loss every time a dollar is confiscated from them.

A. That a Client Cannot Show a Decrease in His Net Worth as a Result of LFofW Taking His Property Is Irrelevant to His Claim

Phillips establishes that the interest generated in IOLTA accounts is the property of the clients whose money is deposited in those accounts. *Phillips,* 524 U.S. at 160. That is precisely what IOLTA takes.[6] Respondents emphasize that the clients' deposits could not yield a "net" benefit to the clients, because bank charges, fees that might be charged by their real estate professionals/lawyers to cover overhead in accounting for and transmitting the funds, and any costs associated with tax accounting would exceed the small amounts of interest earned. At the end of the day in an IOLTA-free world, Respondents contend, the clients' wallet would be not one inch fatter.

This whole line argument is irrelevant. IOLTA supporters made exactly the same arguments in *Phillips*,

[6] The IOLTA rules strictly limit the fees that banks are permitted to charge against the interest generated by IOLTA accounts; all other fees must be billed to the account holder. RPC 1.14(c)(4)(i), APR 12.1(c)(4)(i); Pet. App. 101a-102a, 108a. In that manner, Respondents ensure that a steady income stream continues to flow in LFofW's direction. That stream generally amounts to between $2.5 and $4.0 million per year. *Id.* 7a. LFofW incurs virtually no expenses in collecting those funds. The small sums confiscated from Petitioners and thousands of similarly situated individuals -- funds that are viewed as "pennies from heaven" by IOLTA supporters -- in the aggregate add up to the hundreds of millions of dollars accruing to IOLTA programs nationwide. *See generally,* Kristi L. Darnell, "Pennies From Heaven -- Why *Washington Legal Foundation v. Legal Foundation of Washington* Violates the U.S. Constitution," 77 WASH. L. REV. 775 (2002).

citing precisely the same line of cases. As the Court paraphrased their argument: "it is not that the client funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*." *Phillips*, 524 U.S. at 169 (emphasis in original). And the Court deemed the argument wholly irrelevant to the Takings Clause analysis, explaining, "The government may not seize rents received by the owner of a building because it can prove that the costs incurred in collecting the rents exceed the amount collected." *Id.* at 170. *That is this case*. Respondents never come to grips with this obvious point; instead, they come back with the same analysis that has already failed.

We must take as a premise that the IOLTA interest -- all of it -- is the clients' property.[7] We do not dispute, because it is irrelevant, that obligations to, and charges by third parties might leave the clients with no more coins in their pockets even if they were allowed to opt out of the IOLTA program. The contention is irrelevant because there are myriad circumstances that may prevent a property owner from enjoying at the end of the day an increase to his net worth from the receipt of a particular item of property. A person may be in the hands of his creditors so that whatever money comes to him immediately passes away to others. He may be under obligations to ex-wives or children. He may have contractual arrangements that oblige him to pay the money over to third parties -- such as to lawyers who incurred overhead expenses in assisting him in obtaining the property. None of this is any of the confiscating government agency's business. This is the simple and obvious point behind *Phillips*'s reference to the seizure of rents. Depositors

[7] Respondents have not asked the Court to reconsider its decision in *Phillips*, and the possibility of reconsideration is not comprehended in any of the questions presented in this case.

allowed to opt out of the IOLTA program may well be subject to such third-party obligations -- to the banks, to his real estate professional/lawyer, to his accountant, to the tax collector -- but that is his own business. A depositor's liabilities to third parties do not justify the government in doing him the favor of taking his money so he would not incur or satisfy those obligations. Perhaps he prefers to pay his money over to his tax professionals/lawyers, to his accountant, to a bank, even to the IRS, rather than to LFofW. That is his prerogative. As the Court said in *Phillips*:

> [O]ur conclusion in this regard was premised on the longstanding recognition that property is more than economic value . . . it also consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use and dispose of it . . .

Id. at 170. In this case, that right includes the right to pay the gross interest earned on his deposit to those to whom he stands in contractual relations.[8]

The Justices seek to distinguish *Phillips*'s analysis by insisting not only that IOLTA depositors would be unable on their own to earn "net interest," but that they would be unable to earn any interest at all. Justices Br. 41. The evidence submitted by Petitioners suggests otherwise. But we

---

[8] For example, as noted above, before the 1995 expansion of IOLTA, banks generally were willing to grant earnings credits on escrow funds. Pet. App. 111a. An escrow depositor might rationally prefer that whatever benefit is derived from the use of his funds go to his escrow company rather than to LFofW. In a competitive market, this could result in lower fees to the client. But even if it did not, it does not matter. The client need not have an economic rationale for wanting to control the disposition of what this Court has said is his property.

are willing to accept, for purposes of argument, the Justices' contention that *no* proffered fee payment by an IOLTA depositor to his real estate professional/lawyer, no matter how large, could induce the latter to place deposits in an interest-bearing account. Even if true, this would be irrelevant. As we have said, in light of *Phillips* it cannot be denied that the interest actually generated by Petitioners' funds is their property. Respondents' story about how IOLTA has made possible the creation of value would only be relevant if Respondents were willing to argue explicitly that this is government-created value and therefore subject to confiscation by the government. But that very argument was pressed most particularly by the Solicitor General as *amicus curiae* in *Phillips*, and the Court rejected it. 524 U.S. at 170-71. It should now be put to rest.

B. The Value of the Interest Taken Is Just the Dollar Amount of That Interest

Once the premise is accepted that the IOLTA interest taken by LFofW belonged to the clients, all of the supposed difficulties in this case disappear -- difficulties in valuing what has been taken, in discovering the clients' investment-backed expectations, and in determining how to calculate just compensation. Petitioners Brown and Hayes have supplied all the evidence necessary to calculate the amount of interest income confiscated from them: the principal amount, the number of days the principal sat in an IOLTA account, and the interest rate interest paid on those accounts. JA 49, 50-52, 53, 54-55. LFofW tells us that the interest earned by Brown and Hayes on their IOLTA deposits was less than $5 and $2, respectively. LFofW Br. 6, 8. So be it. What then was the amount of the loss? Somewhat less than $5 and $2. The amount is small, but that is irrelevant. "The Fifth

Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).[9] The amount taken is perfectly definite and calculable -- as LFofW's own calculations demonstrate.

The easy calculability of Petitioners' losses explains why we are largely indifferent between a *per se* Takings Clause analysis (which we think best fits the facts of this case) and the *Penn Central ad hoc* analysis. Respondents attempt to make heavy weather of the *Penn Central* "investment-backed expectation" factor. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). But it is the reasonable expectation of every property owner that the government will pay him just compensation if it seeks to confiscate his property. Thus, Brown and Hayes have reasonable investment-backed expectations that they will be reimbursed $5 and $2, respectively, for the property that was confiscated from them. It is not a very large expectation -- it's only $5 and $2; but nothing in *Penn Central* suggests that reasonable expectations need be honored only if they exceed some minimum dollar amount.

In asserting that "just compensation" in this case is zero, Respondents attempt to rely on a line of cases that indicates that the measure of compensation is the loss to the property owner, not the "gain to the taker." *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1948), LFofW Br. 33-40; Justices Br. 40-43. That reliance is misplaced. Any claim that the loss suffered by Petitioners Brown and Hayes was zero is inconsistent with *Phillips*'s holding that they were the owners of funds (with a readily ascertainable

---

[9] We note, however, that both Brown and Hayes regularly buy and sell real estate, JA 53, 54, and thus continue to be subject to confiscation of their funds by IOLTA programs.

value) that were confiscated from them. It is also inconsistent with *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980), which held that a Takings Clause claim based on confiscation of interest income does not require a showing that the claimant had any right to insist that interest be paid on his funds.

Moreover, Respondents are misapplying the loss-to-the-owner-not-gain-to-the-taker line of cases by invoking it in support of an argument that Petitioners are entitled to *no* compensation. In every one of the cases cited by Petitioners or the Ninth Circuit, the plaintiffs were entitled to *some* compensation; the only issue was the amount of compensation to be paid for confiscated property that (unlike the money confiscated in this case) was difficult to value. Also, in many of these cases, the plaintiff was trying to take advantage of the government's need to go forward with an important public project and to "hold up" the government for premium compensation based on the government's need to obtain the plaintiff's property. *See, e.g., City of New York v. Sage*, 239 U.S. 57, 61 (1915) (land needed by city to construct reservoir; just compensation does not include increased value of land brought about by government decision to construct reservoir). Here, there is no argument that Petitioners are trying to take advantage of the government's particularized need for their property. Rather, it is LFofW that is attempting to take advantage of what it deems a quirk in the banking laws to garner income for itself. LFofW has no need for Petitioners' property in particular; it is just searching for new revenues.

III. EQUITABLE RELIEF IS APPROPRIATE, AND THE COURT SHOULD DECLARE THE IOLTA PROGRAM UNCONSTITUTIONAL AS PRESENTLY CONSTITUTED

When a government takes private property for a public use, the Takings Clause requires "that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (internal quotation marks omitted); *accord Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). The Ninth Circuit correctly held that no such provision exists here and therefore rejected Respondents' ripeness challenge. Pet. App. 21a. The appeals court nonetheless dismissed (for lack of standing) the three Petitioners who sought equitable relief only, concluding that even if those three could establish a Takings Clause violation, the only "appropriate relief" in Takings Clause cases of this sort "is to provide the property owner with just compensation." *Id.* 19a.[10] Petitioners explained at length in their initial brief why the Ninth Circuit's categorical rejection of equitable relief was error. Opening Br. 37-47.

In response, Respondents do not really take issue with Petitioners' contention that the federal courts ought to be free to consider an award of equitable relief in Takings Clause cases in which the appropriated property is money or in which a State government has failed to provide an adequate

[10] Contrary to the Legal Foundation of Washington, LFofW Br. at 41-42, the issue of standing of Petitioners Washington Legal Foundation, Daugs, and Maxwell was clearly raised in the petition, Pet. 23, and again in Petitioners' opening brief, Br. at 37-38. The issue of standing will be resolved by the Court's resolution of the second question presented.

mechanism to obtain compensation for confiscated property. LFofW Br. 43-48; Justices Br. 43-50. Rather, their principal contention is that injunctive relief is inappropriate in light of the particular facts of this case. *See, e.g.*, Justices Br. 46-47 (if federal courts find a violation and grant compensatory relief to Petitioners Brown and Hayes, then no equitable relief is necessary because the Washington State courts would "follow the judgment" and award compensatory relief to similarly situated individuals seeking compensation for the confiscation of their IOLTA interest).

Moreover, the Justices' response to our arguments on equitable relief underscore the need for entry, at the very least, of declaratory relief that Washington's IOLTA program violates the Fifth Amendment by taking property without any adequate provision for just compensation. That response suggests that the Justices plan to react to any loss in the federal courts by adopting a state-court compensation system that -- because it will require claimants to enter state court repeatedly to obtain compensation for the confiscation of small sums of money -- will fall short of the "adequate provision for obtaining compensation" demanded by *Williamson County*.

Respondents speculate that, if this Court rules for Petitioners on the taking issue, then an adequate mechanism for just compensation will instantly become available, since "Washington judges in future cases will . . . follow the law as announced by the Court in this case." LFofW Br. 46. Respondents claim that the compensation mechanism that would thus be made available would prevent further Takings Clause violations, thereby precluding the need for relief that implicates the IOLTA program's legality on a going forward basis. But assuming, as is no doubt true, that some state compensation remedy would become available if this Court were to find that the client-Petitioners are entitled to

compensation, it does not follow at all that such procedures would be an adequate remedy under the circumstances, or that equitable relief addressing the IOLTA program more generally is unnecessary.[11]

This Court has observed that "it would entail an utterly pointless set of activities" if the government were to appropriate money and then pay a claim for compensation, "for every dollar [taken] . . . would be presumed to generate a dollar of . . . compensation." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (internal quotation marks and alterations omitted). In these circumstances, "it cannot be said that monetary relief against the Government is an available remedy," and, accordingly, it is proper for the taking itself to be declared unconstitutional and enjoined. *Id.*; *see also Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980) (holding that taking of interest "was obviously uncompensated" and violated Takings Clause). In an attempt to show that such activities would not be pointless here, Respondents argue primarily that a State can take IOLTA interest and then pay less than the face value of the money taken, thereby retaining the remainder for itself. LFofW Br. 44; Justices Br. 48. As discussed above, however, the proper measure of compensation for each dollar of IOLTA interest -- like any other dollar -- is a dollar. Thus, to require each injured party to file a compensation claim, rather than declaring the program as constituted to

---

[11] Respondents seek to place the burden on Petitioners to show that the as yet non-existent procedure to provide just compensation would be inadequate. On the contrary, because there currently is no compensation provision for IOLTA takings (as the Ninth Circuit held), the burden rests squarely with Respondents to show that this *status quo* will somehow change. In any event, as discussed in the text, the inadequacy of any conventional legal action as a procedure to compensate for IOLTA takings is readily apparent.

work a constitutional violation, would result in a set of activities as "utterly pointless" as those contemplated in *Eastern Enterprises*.

Moreover, in light of the small increments through which the IOLTA program collects its millions, it is obvious that pursuit of claims for just compensation would be far too costly to be worthwhile for any individual claimant. No doubt this is precisely why Respondents would remand claimants to that Bleak-Housian remedy. It is far clearer here than in *Eastern Enterprises*, therefore, that any conventional legal action for recovery of money would be entirely inadequate for the taking of money at issue, since the cost of the remedy would nearly always exceed any amounts recovered. Notwithstanding the contentions of the Justices Br. 49-50, the availability of equitable relief in these circumstances would not "radically alter takings jurisprudence" by "effectively . . . negat[ing] the ability of government to take private property for public purposes at all." On the contrary, it is the Constitution itself that forecloses the IOLTA program in its present form. Government may not set up a program that arbitrarily seizes small amounts of money from certain individuals, and protect it against challenge by offering a compensation remedy that costs more to pursue than the amounts at stake in the litigation.

Accordingly, Petitioners are entitled to a declaration that the IOLTA program as presently constituted effectuates an unconstitutional taking of property without just compensation.

CONCLUSION

Petitioners respectfully request that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

Charles Fried
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4636

Donald B. Ayer
Louis K. Fisher
Jones, Day, Reavis & Pogue
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

James J. Purcell
1218 3rd Ave., #2403
Seattle, WA 98101
(206) 622-5322

Date: November 18, 2002

310